No. 94-1332

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondents contend that review by this Court is unwarranted because the court of appeals' holding that the Forest Service must reconsult on the forest plans at issue was based on the peculiar facts of this case, and that the court articulated no broad, categorical rule. See, *e.g.*, Br. in Opp. 1, 14, 18-19. That contention is at odds with the court of appeals' decision.

The court of appeals' requirement that consultation be reinitiated on previously approved forest plans did not turn on any unusual characteristics of the particular plans at issue in this case. Nor did it turn, as respondents suggest (Br. in Opp. 19), on the peculiar needs of the newly listed salmon. Rather, the court first held, as a matter of law,

that previously approved forest plans, by their very nature, constitute "ongoing agency action" within the meaning of the Endangered Species Act (ESA). See Pet. App. 7a. The court then concluded—essentially without analysis—that Section 7(a)(2) of the Act required consultation on those plans. We believe that both those holdings are wrong. See Pet. 15-17, 19-21. In any event, however, the court's pronouncements that an existing plan is "action" and that plan-level consultation is required are categorical rulings, not limited (or even related) to any facts peculiar to the plans or species at issue.

Moreover, respondents' contention in this Court that the court of appeals' decision is fact-bound is inconsistent with respondent Pacific Rivers Council's claim in its essentially identical case (*PRC* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho)) seeking broad injunctive relief against site-specific activities in Idaho based on the Forest Service's failure to reconsult on plans it previously adopted for six national forests in that State. During oral argument on December 6, 1994, on its partial summary judgment motion in that case, PRC stated (Tr. 6):

> [T]here is no longer any question that the Forest Service must comply with Section 7(a)(2) of the [ESA]. Forest plans are agency actions that may affect the salmon and require consultation * * * under Section 7(a)(2). This issue was laid to rest by the Ninth Circuit in Pacific Rivers Council v. Thomas.

The district court agreed and broadly enjoined site-specific activities until completion of consultation. See page 6, *infra*.

b. Nor is there any ground for respondents' contention (Br. in Opp. 19) that the court of appeals' decision is based on the "history of consultation" in this case. In holding that "consultation on the entirety of both LRMPs is

required, not just an amendment to the LRMPs" (Pet. App. 13a n.12), the court addressed neither the sufficiency of the consultation the Forest Service intends to undertake on any future plan amendments, nor the status or adequacy of consultations on any site-specific activities. Rather, the court's holding rested on its erroneous conclusions that (1) the mere continued existence of a forest plan is agency "action," and (2) jeopardy to a species can be prevented only by consultation on the plans themselves.

Respondents suggest (Br. in Opp. 19) that the court of appeals' ruling was necessary to prevent the Forest Service from "managing the forests * * * for an indefinite period of time without consulting with NMFS [the National Marine Fisheries Service] on the decisions made in the plans." Respondents' underlying premise (that forest plans dictate decisions about site-specific activities, see *id.* at 5) ignores that the Forest Service's management of forests takes place at both the plan level and the site-specific level. See Pet. 3-4. It is true that a site-specific project may not be carried out if it is prohibited by the forest plan. But it does not follow that all site-specific projects that are not affirmatively barred by the plan will be allowed to proceed. Where, as here, a land-management plan envisions ESA consultation prior to site-specific activities, the action agency reasonably may conclude that it has adequately ensured that the plan itself will not jeopardize the species. See Pet. 4, 16 n.10.

c. Respondents contend (Br. in Opp. 20-21) that reconsultation on the existing forest plans was required by 50 C.F.R. 402.16. As we have explained (Pet. 18 n.12), however, that regulation is inapplicable both because the plans at issue here were never the subject of formal consultation and because the continued existence of a plan is not, in any event, an "action" within the meaning of the

regulation. Moreover, as respondents appear to acknowledge (Br. in Opp. 21), the only discretionary authority the Forest Service retains over previously adopted plans is to amend them, which is what the Forest Service planned to do before the court of appeals rendered its decision.[1]

d. The court of appeals has imposed on federal agencies a rigid requirement that they engage in ESA consultation in a particular manner, and at a particular time. That holding has no basis in the ESA, which affords federal agencies substantial discretion to determine the appropriate time and manner of consultation. Respondents of course are correct that the factual circumstances of particular species or forests may vary. That point, however, reinforces rather than undermines the need for review by this Court. It is *because* circumstances vary widely that effective and efficient implementation of the ESA requires that the agencies concerned have substantial latitude to determine how the Act's no-jeopardy mandate can best be satisfied in a particular setting. The Ninth Circuit's rigid ruling will hinder the ability of action and consulting agencies to employ approaches to consultation that are tailored to the exigencies of the particular species, forest, and land-management plan involved. That ruling is of broad significance, because there are 284 million acres of federal land (covered by 186 planning documents) in the Ninth Circuit, and the con-

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[1] Citing a reference to 50 C.F.R. 402.16 in a biological opinion issued at the end of formal consultation on another forest plan, respondents assert (Br. in Opp. 21) that the ruling below is supported by "expert agency practice." In fact, NMFS, the expert agency responsible for anadromous fish, specifically concluded in this case that reinitiation of consultation was not required on the previously adopted forest plans when the salmon at issue here were listed, and both NMFS and the Fish and Wildlife Service take the position that such consultation is not legally required by the ESA.

sulting agencies have proposed for listing 58 additional species found in that circuit. See Pet. 14, 29.

2. Respondents offer essentially no defense of the award of injunctive relief by the courts below without any finding that the newly listed salmon would be harmed by any of the site-specific activities that were brought to a halt.[2] Respondents do contend (Br. in Opp. 25-27) that the court of appeals ultimately did not determine the proper scope of an injunction barring site-specific activities during the consultation process; they assert that it directed entry of an injunction barring site-specific actions only until consultation was *reinitiated*. The court of appeals made clear, however, that the injunction it ordered would not expire upon reinitiation of consultation, but would remain in effect unless and until it was modified by the district court. See Pet. App. 16a-17a. And the court of appeals directed the district court how to proceed in determining whether to modify the broad injunction once consultation was reinitiated (*id.* at 16a):

> [The district court] may find guidance in [*Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)], where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable

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[2] The only actions that the Forest Service allowed to go forward were those that it had found were *not* likely to adversely affect the species. Respondents did not challenge any of those determinations in their complaint, and neither court below set aside any of those determinations or independently found that the salmon would be harmed by any of the site-specific activities they enjoined. See Pet. 24-28.

commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.

On remand, the district court concluded that "[u]nder the language of the Ninth Circuit's remand, timber sales may not go forward because they constitute per se irreversible and irretrievable commitments of resources which violate § 7(d)." Pet. App. 54a. The district court made clear that it regarded the court of appeals' discussion of timber sales as "part of the law of the case." *Ibid.* That likewise was respondents' interpretation of the Ninth Circuit's decision: In their motion for a permanent injunction on remand, respondents argued (at 3) that based on the Ninth Circuit's "direction" in the passage quoted above, the district court "can and must issue the injunction now requested by PRC." The federal district court in the Idaho litigation brought by respondent PRC likewise concluded that the Ninth Circuit's decision in this case required it to enjoin all ongoing site-specific activities, even those the Forest Service had found were not likely to adversely affect the listed salmon. See *PRC* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho Mar. 8, 1995), slip op. 1-2 ("Based upon unambiguous Ninth Circuit precedent, this court found that the failure of the National Forest Service to timely complete formal consultation with the National Marine Fisheries Service compelled the order enjoining all ongoing as well as proposed construction, timber, grazing and mining activities.").

In a similar vein, respondents contend that questions concerning the appropriate scope of injunctive relief in this case are "still percolating through the lower courts" (Br. in Opp. 24), and that review by this Court would therefore be "premature" (*id.* at 27). As respondents point out (*ibid.*), appeals from the district court's order on

remand are currently pending in the Ninth Circuit. Respondents fail to note, however, that they have filed a motion to dismiss those appeals as moot (see Motion To Dismiss the Appeal and Cross-Appeals as Moot, Nos. 94-36056, 94-35201 & 95-35021 (9th Cir. filed Mar. 9, 1995)) and that they unsuccessfully opposed the government's request that the Ninth Circuit hold their motion to dismiss in abeyance pending this Court's ruling on our certiorari petition (see Response to Motions to Hold in Abeyance, Nos. 94-36056, 94-35201 & 95-35021 (9th Cir. filed Mar. 20, 1995)).[3] In short, while respondents argue that review by this Court should await further consideration by the Ninth Circuit of the proper scope of injunctive relief, they are simultaneously attempting to prevent any such consideration from taking place in that court.

3. The plan-level consultation required by the court of appeals has now been completed, and the injunction entered by the district court on remand has expired by its own terms. Respondents argue (Br. in Opp. 13-17) that the certiorari petition should be denied because the case is moot. We disagree. Contrary to respondents' contention, the issues presented here are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990); see Pet. 30 n.22. However, if the Court concludes otherwise, we believe that the proper disposition is to vacate the judgment of the court of appeals rather than to deny the petition.

a. Respondents contend that "the issues presented in the petition are so narrow and fact-specific that they are unlikely to recur," and that "[t]he case framed by petitioners is virtually certain *not* to recur." Br. in Opp.

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[3] The motions to hold in abeyance were granted on March 31, 1995.

14. As we explain above (see pages 1-5, *supra*), respondents' attempt to characterize the dispute in this case as narrow and fact-specific is without merit. The question whether federal land-management agencies must engage in plan-level consultation upon the new listing of a threatened or endangered species that inhabits land covered by an existing forest plan is certain to recur frequently, given the anticipated volume of new listings in the near future and the large number of previously adopted plans. See Pet. 29. And in light of the Ninth Circuit's ruling that such consultation is required, questions concerning the permissible range of site-specific activities during reconsultation, as well as the availability of injunctive relief in the absence of any showing of harm to the species, will also inevitably recur.

Respondents acknowledge that consultation under the ESA ordinarily takes place within a truncated time frame. See Br. in Opp. 23 ("Consultations must normally be completed within 90 days."). Respondents contend, however, that the issues presented need not have evaded review by this Court because the government "could have sought a stay from the court of appeals and this Court, enabling it to seek review before consulting on the LRMPs." *Id.* at 16. The fate of any motion in the court of appeals to stay the mandate was surely sealed when the government vigorously but unsuccessfully opposed respondents' request that the court of appeals bypass the usual rules and issue its mandate before the government's petition for rehearing was filed.[4] In any event, respon-

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[4] See Opposition of the Federal Appellees in 93-36162/Cross-Appellants in 94-35042 to Emergency Motion for Injunction Pending Issuance of the Mandate or, in the Alternative, for Immediate Issuance of the Mandate (9th Cir. filed July 26, 1994). The court of appeals issued its mandate on August 4, 1994.

dents cite no authority suggesting that a request for such a stay is a prerequisite to invocation of the "capable of repetition, yet evading review" exception to mootness doctrine. Nor would such a requirement be conducive to effective use of this Court's scarce resources. There is consequently no merit to respondents' assertion that this case has become moot by virtue of voluntary compliance with the lower court's order.

Finally, respondents suggest (see Br. in Opp. 14) that even if the issues presented here could be expected to arise in future litigation, they could not be expected to arise in future litigation between the same parties. "PRC is no longer aggrieved," they insist, "and forcing it to litigate a case on behalf of unknown future parties is inconsistent with the strictures of Article III." *Ibid.* In light of respondents' asserted interests in "monitoring and protecting public lands, waters and wildlife," Pet. App. 20a-21a, it would seem reasonably likely that respondents will continue to be affected by federal land-management practices, including the manner in which ESA consultation is conducted upon the listing of new species. Indeed, as we have pointed out (see pages 2, 6-7, *supra*), respondent PRC is currently involved in such litigation with respect to six national forests in Idaho.

b. For the foregoing reasons, we believe that this dispute is "capable of repetition, yet evading review," and that the case is therefore adjudicable by this Court despite the fact that consultation has been completed and the injunction against site-specific activities has expired. However, if this Court chooses to treat respondents' submission and representations in this Court as a sufficient basis for accepting the premise that the legal issues presented are not likely to recur in litigation involving respondents, the judgment of the court of appeals should be vacated. The Court's "ordinary practice in

disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss." *Lewis*, 494 U.S. at 482. That disposition is inappropriate, we recognize, where "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). Contrary to respondents' contention (Br. in Opp. 16-17), however, neither the government's compliance with the ruling of the court of appeals (in order to enable private parties who are dependent on the forests to resume site-specific activities) nor its inability to obtain a stay is properly regarded as a "voluntary forfeiture of review constitut[ing] a failure of equity," *Bancorp*, 115 S. Ct. at 392, so as to disentitle the government to the relief of vacatur.[5]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded with directions to dismiss the complaint as moot.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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[5] See *Honig* v. *Students of California School for Blind*, 471 U.S. 148, 149-150 (1985) (per curiam) (court of appeals judgment affirming entry of preliminary injunction vacated where petitioners had completely complied with injunction prior to this Court's ruling on petition for a writ of certiorari); *University of Texas* v. *Camenisch*, 451 U.S. 390, 393-394 (1981) (same).